77-1002

In The

Supreme Court of the United States

October Term, 1977

No.

SABATO VIGORITO, *et al.*,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Sabato Vigorito, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 13, 1977. A timely petition for rehearing *en banc* was denied, with two dissents, on December 15, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals, by a divided (2-1) panel vote, affirmed a judgment entered after

a jury trial in the United States District Court, Eastern District of New York (Jacob Mishler, C.J.), which found petitioner guilty of complicity in operating an illegal gambling business in violation of 18 U.S.C. §1955. Petitioner was sentenced for a term of six months and fined $20,000.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within thirty days of the Court of Appeals' denial of the motion for reargument *en banc*.

QUESTIONS PRESENTED

1. Whether multiple, surreptitious, non-court authorized entries into a protected premises by FBI agents for the purpose of installing, maintaining and removing eavesdrop devices violates the Fourth Amendment and the Federal Wiretap Statute (18 U.S.C. §2510, *et seq.*).

2. Whether the tapes of the court-authorized eavesdrop orders were timely sealed.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is 18 U.S.C. §2518(8)(b) and appears as Appendix D to this petition.

STATEMENT OF FACTS

Petitioner was convicted with his co-defendants James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Saverio Carrara, Bario Mascitti and Anthony DiMatteo of conducting an illegal gambling business from the period April to June, 1973. The government's theory of the case was that these defendants

and Eugene Scafidi and Robert Voulo[1] conducted a large-scale lottery-type gambling operation in Brooklyn, New York during certain discreet periods of time.

The government established its case against petitioner and his co-defendants through the introduction of electronically-seized court-authorized electronic surveillance conducted at the HiWay Lounge, a bar and grill located in the Williamsburg section of Brooklyn.

The surveillance at the HiWay Lounge took the form of electronic "bugs" which were surreptitiously installed inside the lounge by agents of the FBI.

The first "bug" (hereinafter "HiWay I") was installed, following the approval of the government's eavesdrop application by Hon. John R. Bartels, on April 12, 1973. The authorized period of surveillance was for 15 days, excluding Sundays. Petitioner was not an enumerated target of this eavesdrop order. However, his conversations were electronically seized by virtue of this eavesdrop order and such conversations were admitted against him at trial.

The second "bug" (hereinafter "HiWay II") was installed on May 3, 1973 after permission was obtained from Judge Bartels. This eavesdrop order was approved some three days following the termination of HiWay I. Petitioner was likewise not an enumerated target of the eavesdropping and was unnamed in the eavesdrop order. However, his conversations were seized pursuant to electronic surveillance, and these conversations were introduced against him at trial.

A third eavesdrop order (hereinafter "HiWay III") was issued on May 24, 1973, but the government consented to the

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1. The latter two were likewise convicted of conducting an illegal gambling business during the period March to July, 1972.

suppression of these conversations because these tape recordings were not sealed until some three months after the termination of the eavesdrop order in violation of 18 U.S.C. §2518(8)(a).

Petitioner and his co-defendants moved prior to trial to controvert the eavesdrop orders and suppress the conversations seized thereunder *inter alia* upon the basis that the FBI agents had gained surreptitious and non-court ordered entry into the HiWay Lounge itself to install, rearrange and rejuvenate the batteries of the electronic surveillance devices employed. In addition, counsel contended that the tape recordings seized under HiWay I and II had not been timely and properly sealed, as required by 18 U.S.C. §2518(8)(b), and that the government had not offered a sufficient legal explanation for not sealing said tape "immediately", as the "sealing" statute requires.

Judge Mishler conducted a hearing upon defendants' motions and at the conclusion of the hearing denied the motion to suppress.

An extensive jury trial was held before Judge Mishler during July and August, 1976, during which the challenged electronically seized tape recordings were played to the jury. Petitioner was convicted of violating 18 U.S.C. §1955.

Following the imposition of sentence, petitioner and his co-defendants appealed their convictions to the Court of Appeals for the Second Circuit, where they renewed their arguments concerning the impropriety of permitting government agents to conduct multiple break-ins of the HiWay Lounge to install, reactivate and alter the positioning of the eavesdrop devices, as well as questions concerning the government's failure to strictly comply with the "sealing" statute.

By a divided (2-1) court, the Second Circuit affirmed the defendants' convictions. An application for rehearing and rehearing *en banc* was denied. This petition ensued.

REASONS FOR GRANTING THE WRIT

I.

The government's multiple and non-court sanctioned entries into the HiWay Lounge violated both the Fourth Amendment and the federal wiretap statute and required suppression of the conversations seized thereunder.

Notwithstanding the fact that electronic surveillance has received congressional approval only after, and as a direct result of, stern statutory controls placed upon wiretapping and the government agencies which conduct it, this case exemplifies the total abuse which exists when temporary governmental "lapses" at strict compliance with the wiretap statute (18 U.S.C. §2510, *et seq.)* are permitted to go unchecked. Sought by the government in an effort to gain oral evidence against an alleged band of Brooklyn gamblers, the eavesdrop orders involved in this criminal proceeding never spelled out or even suggested that the agents designated to install the electronic "bugs" employed herein had the right to break into a public bar and grill, like a band of common burglars, to install those devices.

On some five occasions, without receiving the approval of the judge who authorized the electronic surveillance, or any other neutral and detached magistrate, for that matter, agents of the government gained entry into the HiWay Lounge with all the stealth and cunning of common burglars. During these interludes, the government agents *sua sponte* installed the eavesdrop devices, moved the positioning of the eavesdrop devices, rejuvenated them and ultimately removed them. All of these procedures were conducted in the clear and conceded absence of judicially exercised authority or approval. Simply, the FBI went in and out and used the HiWay Lounge as if they owned it.

No one in the government told the court what it was doing or the frequency of their activity. In the self-proclaimed goal of seizing the conversations of gamblers, the FBI rode roughshod over the Fourth Amendment's warrant requirement and violated the privacy rights of dozens of American citizens.

We respectfully submit that the mere grant of judicial authority to install an eavesdrop device does not carry with it implicit authority to take any steps, including night-time burglary and criminal tampering, unless and until a federal judge approves such entry and activity after a proper, common sense, non-technical[2] application for leave to conduct such entry and activities.

This position is particularly pertinent when one considers that the premises involved in this case is a dimly lit bar and grill open to the public. It is certainly not clear, and the government bears the burden of explaining the propriety of its activity, whether the eavesdrop approving judge knew, much less reasonably suspected, that the activity complained of herein was contemplated by the government. By not alerting the court to the intentionally planned multiple break-ins which were conducted, the government lulled the judge into a false sense of judicial security and denied the judicial branch any input, which is constitutionally and statutorily required, as a condition precedent to the executive branch's non-consensual entry into the private premises of one of its citizens.

The propriety of this type of governmental activity has received review in our federal intermediate appellate courts. In *United States v. Ford,* 553 F.2d 146 (D.C. Cir. 1977), *aff'd,* 414 F. Supp. 879 (D.C. 1976), the Court of Appeals affirmed an order of the United States District Court for the District of Columbia which suppressed electronically seized conversations

2. See *Ventresca v. United States,* 380 U.S. 102 (1965).

which were tainted due to a series of surreptitious entries into the subject premises.

In *Ford,* as opposed to the case at bar, the government prosecutor took care to apprise the authorizing judge. No formal record was made, however, of the colloquy between the prosecutor and the court upon which basis court approval to make a surreptitious entry was granted. The court declined to hold that the power to intercept carries with it the unbridled right to take whatever steps law enforcement agents unilaterally determine are necessary to install the listening devices. Rather, the court recognized that each entry requires separate "on the record" judicial approval. Thus the court wrote:

> "Essential to our holding is the premise that entries to plant 'bugs' are themselves invasions of privacy distinct from the actual eavesdrop, and therefore require separate consideration in the warrant procedure. If police are to be permitted to enter private premises to conceal eavesdropping devices — a question we leave unresolved — they at least must be required to proceed in accordance with the authorization of a warrant narrowly tailored to the demonstrated demands of the situation."[3]

In the case at bar the Second Circuit has declined to disapprove the multiple surreptitious entries involved under circumstances where the prosecution did not even attempt to apprise or secure approval from the authorizing judge. Thus, if anything, the governmental conduct in *Ford* is amenable to an argument of "good faith" — albeit a failure to fully comply with the warrant requirement's insistence that warrants be predicated upon an oath or affirmation. Nonetheless this failure to comply

3. See *United States v. Ford,* 553 F.2d 146 at p. 170.

with the warrant requirement and gain the requisite approval in the proper constitutional manner doomed the government's use of the evidence in *Ford.* In the case at bar the government conducted far more numerous covert entries and did not even attempt to act in good faith by obtaining formal or informal judicial approval. Thus this case is far weaker than *Ford,* both on the law and the facts, as well as equitably from the viewpoint of prosecutorial "good faith."

Similarly, in *Application of the United States,* 563 F.2d 637 (4th Cir. 1977), a panel of the Court of Appeals for the Fourth Circuit reversed a district judge's order which, after an *in camera* hearing, declined to authorize an application submitted by the Maryland United States Attorney to install an eavesdrop device inside a particular premises. In reversing the District Court, however, the Court of Appeals noted that the order in question sought both the interception of particularly described conversations *and* approval to conduct one or more surreptitious entries attendant to the installation and proper monitoring of the eavesdrop devices.

The Fourth Circuit went on to note that in its opinion the Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), impliedly authorized necessary surreptitious entries where such were judicially found to be necessary and attendant to eavesdropping authorization. However, the court was careful to warn that:

> "We do not mean to imply, however, that merely because Congress contemplated the use of surreptitious entries, a Title III order authorizing the interception of conversations gives eavesdroppers *carte blanche* to take any steps whatsoever to effectuate their plan. Secret physical trespass upon private premises for the purpose of planting a bug entails an invasion of privacy of constitutional significance distinct

> from, though collateral to, that which attends the act of overhearing private conversations. While we have held that judicially granted permission to invade an individual's expectation of conversational privacy, pursuant to Title III's guidelines . . . such permission does not suspend the operation of the Fourth Amendment for other purposes." *Application of the United States,* 563 F.2d 637 at 643.

Separate judicial approval to make a covert or surreptitious entry was found to be a constitutional prerequisite to such a forced entry upon private property. Absent such approval, the right to enter will not be implied.

Similarly, in *United States v. Agrusa,* 541 F.2d 690 (8th Cir. 1976), *cert. denied,* ____ U.S. ____, the court held that surreptitious entries attendant to electronic surveillance are governed by the Fourth Amendment's warrant requirement such that entries may only be made pursuant to express judicial approval. Needless to say, the Federal Strike Force for the Eastern District of New York never considered or attempted to obtain this manner of approval. Their actions can be characterized not by *bona fides,* but rather simply as an exercise of raw, nonjudicially-monitored government power.

By sanctioning both the number and manner of FBI break-ins involved, the Second Circuit has travelled down the philosophical path of recognizing that the power to intercept carries with it the non-judicially reviewable grant to investigators to make trespassory contact however often and in whatever manner the police unilaterally deem fit. Under the guise that it is not the business of the judicial branch to play any role in sanctioning or monitoring the manner in which court-authorized intercept devices are placed, the court declined to find a judicial role in a crucial phase of eavesdropping.

Specifically, we dispute Judge Moore's thesis that requiring federal *nisi prius* judges to play an initial supervisory role in passing upon surreptitious entry provisos "would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competency was greater than that of the agencies presumably skilled in their field."

Indeed, in a somewhat analagous area, the federal judiciary has long been required to pass upon and find that electronic surveillance was being conducted after an exhaustion of "other investigative techniques" [see 18 U.S.C. §2518(1)(c)]. No one has suggested that this provision has drawn federal judges into the role of participants in "back up" teams, in the back seat of "prowl" cars or debriefing "stool pigeons". Rather, this provision has been interpreted to require a common sense showing that electronic surveillance is not an investigative tool of the first resort. Clearly both law enforcement and the courts have "lived" with 18 U.S.C. §2518(l)(c) and nothing "unseemly" has come of this compelled statutory relationship.

In sum; to hold, as does the Second Circuit, that once probable cause to conduct an eavesdrop operations exists the court washes its hands of and has no proper role in passing upon or regulating the nature and manner of "black bag" surreptitious entries into private property grants to law enforcement a delegation of power and control over private property never heretofore recognized in a free society during peacetime. The manner of installation clearly raises distinguishable, but nonetheless poignant, Fourth Amendment concerns which stand separate and apart from the license to intercept. Too much is constitutionally at stake to allow the federal judiciary to "pack its tent" and leave the question of monitoring such entries to the good graces of one's local FBI agent.

Two centuries ago this county fought for its independence from England, in some measure predicated upon its belief that the use of private homes for the quartering of Bristish troops and the conduct of warrantless and random searches was odious and should not be tolerated. To sanction, as does the Second Circuit, non-judicially controlled "black bag" break-ins by federal law enforcement officers masquerading as third-rate burglars suggests that conduct we would not stomach from the British is acceptable when engaged in by an American constable.

We do not think so and have to believe that those freedom-fighters of two centuries ago would be repelled and revolted to learn that the government can break into private property when and how it wants to catch a petty criminal.

This writ should issue because, if this is the route we are taking in this country and if this is the Fourth Amendment path we are taking, the highest court in this country should affirmatively and distinctly say so. If the seal of approval is to be given to non-judicially authorized break-ins, this Court should be the one to sanction it and explain how the Fourth Amendment remains a viable protection in the aftermath.

II.

The tapes of the intercepted conversations were not sealed timely and properly. It was error to allow them to be introduced in evidence.

Title 18 of the United States Code, Section 2518(8)(a),which establishes the obligation to seal the tapes generated by electronic surveillance, provides:

> "The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable

> device. The recording of the contents of any section shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders."

It was mindful of this statutory obligation that defense counsel moved to suppress the government's use of the HiWay I and HiWay II tapes. More specifically, it was contended before Judge Mishler, and later on appeal before the Second Circuit, that the government's three day delay in sealing the tapes generated under both intercept orders violated Section 2518(8)(a) on its face. Nonetheless, the trial judge declined to suppress these tapes and the Court of Appeals affirmed the order of denial.

Initially, we note our disagreement with Judge Moore's holding that HiWay II was an extension of the eavesdropping conducted by virtue of the HiWay I intercept order. While it is concededly true that the same premises and many of the same people were targeted for electronic interception under both orders, we submit that HiWay II cannot be considered an extension of HiWay I as a matter of law.

At the time HiWay II approval was given, HiWay I had already been terminated for a minimum of three days. An extension has been defined as a "prolongation" (Funk & Wagnalls, *New Standard Dictionary of the English Language*). This presupposes, of course, that something is in existence which is to be prolonged. Since the predecessor order had already expired and had no post-termination viability, the concept that HiWay II was an extension of HiWay I is a legal and logical impossibility.

Turning to the length of "sealing" delay, six days by petitioner's calculations and three days by the government's, we respectfully submit that such delay undermines any finding that sealing was performed immediately.

A reading of the federal sealing statute reveals there is no ambiguity or equivocation to it. It simply states that immediately after an eavesdrop order has terminated, the prosecutor must transport the original tape recordings to the issuing judge, and he must seal the tapes.

The use of the word "immediately" was not, we contend, chosen casually by the Congress. Indeed, when one considers that Congress gave prosecutors a "reasonable time" to serve post-interception notices of interception [18 U.S.C. §2518(8)(d)], gave judges 30 days to notify the Administrative Office of the United States Courts concerning approval or denial of an eavesdrop request (18 U.S.C. §2519), that "progress reports" must be filed at such intervals as the judge may require [18 U.S.C. §2518(6)], and that prosecutors must move to amend their eavesdrop orders as "soon as practicable" when evidence of offenses not specified in the original intercept order are overheard [18 U.S.C. §2515(5)], it is manifest that the legislative body made these types of time distinctions within one title of a statute with the intention that strict compliance will be forthcoming.

The sealing requirement has been given strict construction by many of the federal and state courts which have considered it. See *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976); *United States v. Ricco*, 421 F.Supp. 401 (S.D.N.Y. 1976); *People v. Nicoletti*, 34 N.Y.2d 249, 356 N.Y.S.2d 855 (1974); *People v. Sher*, 38 N.Y.2d 600, 381 N.Y.S.2d 843 (1976). Indeed, in *People v. Scaccia*, ____A.D.2d____, 390 N.Y.S.2d 743 (4th Dept. 1977), a 14 day sealing delay was found fatal. In *People v. Guenther*, 81 Misc. 2d 258, 366 N.Y.S.2d 306

(Sup. Ct. 1975), a seven day sealing delay was deemed fatal. In *People v. Seidita,* N.Y.L.J. 3/25/77, p. 15, col. 4 (Sup. Ct. 1977), the court declined to excuse a six day delay in sealing and suppressed the intercepted conversations. In *People v. Washington,* 55 A.D.2d 609 (2d Dept. 1976), although a longer (39 days) delay was involved, the making of duplicate tapes did not excuse the delay in sealing.

The delay in sealing in the case at bar was sought to be explained by the government on the basis that it needed time to process their application. This position was adhered to, notwithstanding the fact that HiWay II was begun to be processed as early as May 1, 1973. The government prosecutor travelled to the Justice Department in Washington, D.C., but was unable to explain why it took until May 3 to gain approval for HiWay II. No explanation was offered to suggest why he waited until the day he applied for another intercept order to have the tapes of HiWay I sealed. Similarly, the tapes generated under HiWay II were sealed on the day application for approval of HiWay III was made.

During the interim between interception and sealing, the tapes were kept by Agent Parsons in a file cabinet in his office. He believed he had the only key, but was uncertain whether there were other keys in existence. It was not a special cabinet. Approximately 100 other agents occupied and actively worked in that room. On some occasions, he received the tapes the day after the interception. The individual boxes the tapes were in were not sealed. The procedure followed upon sealing was that a large box containing a series of tapes was sealed, not the individual boxes containing the tapes. On some occasions when Parsons was out of the office, the tapes were given to another agent to whom he gave the key to the cabinet.

The agent also stated that the wait to seal was predicated upon the plan to have them sealed when the next order was

signed. The agent testified that the tapes were taken by him from the file cabinet and reproduced and returned prior to their sealing.

The prosecutor testified that on certain occasions when Agent Parsons did not receive the tapes on the same day they were recorded, but on a subsequent day, during the hiatus another agent would keep the tapes in his custody.

The court denied the motion. The court based its decision upon its conclusion that the tapes were sealed at the time of the signing of another order, in the case of HiWay I, of course, HiWay II, and in the case of HiWay II, HiWay III, and that these subsequent orders were extensions of the earlier ones and were obtained expeditiously.

We disputed below and renew herein the concept that delays occasioned by the lethargy of a prosecutor or to enhance his own convenience cannot excuse delays of this nature. For this reason, the rationale of sealing, *i.e.*, to insure the integrity and reliability of the tapes, was undermined at bar not only by the delay, but also by the vagueness and laxity of the security surrounding some, if not all, of the tapes.

When one considers that FBI Agent Parsons testified that some of the tapes were held by the monitoring agents overnight and were not delivered to him until the following day, that after the tapes were duplicated they were placed in a file cabinet in a room where 100 agents were present under circumstances where Parsons was not sure he possessed the only key, that during Parsons' absence he delegated the duty of storing the tapes to another, and that the government adduced no evidence below as to what this agent did during this period, it certainly cannot be said that the sanctity of these tapes has been insured.

Mindful of all of the above and the importance of the sealing process of every jurisdiction which permits electronic

surveillance, this Court should grant the writ of certiorari and provide vital guidance in this important area of evidence gathering.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be granted and that this case be paired with the petition of James V. Napoli, Sr. and James V. Napoli, Jr.

Dated: New York, New York
January 12, 1978

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Petitioner
Sabato Vigorito

ROGER BENNET ADLER
Of Counsel

APPENDIX A
DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED OCTOBER 13, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 909, 910, 911, 912,
913, 914, 915, 916, 917—September Term, 1976.

(Argued May 16, 1977 Decided October 13, 1977.)

Docket No. 76-1495

UNITED STATES OF AMERICA,

Appellee,

—against—

EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DIMATTEO, SAVERIO CARRARA, MICHAEL DELUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGORITO,

Appellants.

Before:

MOORE, SMITH and GURFEIN,

Circuit Judges.

Appeal from judgments entered in the United States District Court for the Eastern District of New York before Honorable Jacob Mishler, *Chief Judge*, convicting appellants of conducting illegal gambling businesses in violation of 18 U.S.C. §1955.

All convictions affirmed.

FRED F. BARLOW, Special Attorney, Department of Justice, Brooklyn, New York; and

Decision of the United States Court of Appeals

MICHAEL E. MOORE, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York; William G. Otis, Attorney, Department of Justice, of counsel), *for Appellee.*

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RICHARD W. HANNAH, Esq., Brooklyn, New York, *for Appellant DiMatteo.*

SALVATORE PIAZZA, Esq., Brooklyn, New York, *for Appellant Carrara.*

MAX WILD, Esq., New York, New York (Albert J. Brackley, Esq., on the Brief), *for Appellant DeLuca.*

THOMAS J. O'BRIEN, Esq., New York, New York, *for Appellant Napoli, Jr.*

MAX WILD, Esq., New York, New York (Rubin Baum Levin Constant & Friedman, of counsel), *for Appellant Napoli, Sr.*

DOMINICK L. DICARLO, Esq., Brooklyn, New York (Donald E. Nawi, of counsel), *for Appellant Voulo.*

GUSTAVE H. NEWMAN, New York, New York, *for Appellant Vigorito.*

Decision of the United States Court of Appeals

MOORE, *Circuit Judge:*

Nine defendants, Eugene Scafidi, Robert Voulo, James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Sabato Vigorito, Saverio Carrara, Bario Mascitti, and Anthony DiMatteo appeal their convictions, after a jury trial before Chief Judge Mishler in the Eastern District of New York, for operating illegal gambling businesses in violation of 18 U.S.C. §1955.

The counts upon which the various defendants were convicted related to operations at different times and places. More specifically, twenty defendants were tried together on four counts of a seven-count indictment. Scafidi and Voulo were convicted on Count Two (the "967 East Second Street Count") of conducting an illegal gambling business from March, 1972 to July 1972. Appellants Napoli, Sr., Napoli, Jr., DeLuca, Vigorito, Carrara, Mascitti, and Di Matteo were convicted on Count Four (the "Hiway Lounge Count") of conducting an illegal gambling business from April, 1973 to June, 1973. Count Three (the "Apartment 309 Count") was dismissed after trial because the jury did not find five people involved in that gambling business, as required by §1955. Count Seven, the conspiracy count, was dismissed at the close of the Government's case because the indictment alleged a single conspiracy but the evidence showed at least two. Sentences for the defendants ranged from five years in prison and a $20,000 fine (Napoli, Sr.) to two months in prison and 34 months probation (Scafidi).

I.

The evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count).

The 967 East Second Street Count: Scafidi and Voulo.

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence at the above address. They discovered Voulo and two others in the basement operating a policy "bank". They seized a great deal of betting paraphernalia, some of which contained Voulo's fingerprints.

Visual surveillance prior to the search had established that Voulo, Scafidi and others had been using the residence for more than one month. Apparently, Scafidi regularly picked up daily policy "ribbons" for delivery to the ring's "controllers" around the city.

Also, a warrant-authorized search of 405 Elder Lane in Brooklyn in June, 1971, had found Scafidi and Voulo standing at a table piled high with betting slips, adding machines and cash.

The Apartment 309 Count: DiMatteo, Mascitti, Scafidi, Voulo, and Rocco Riccardi (all charged, but count dismissed after guilty verdicts were rendered only against the first four).

The evidence on this count consisted primarily of tape recordings made pursuant to court-ordered electronic equipment (referred to herein as "bugs") placed at the apartment of a friend of Mascitti. The friend allowed Mascitti to use the apartment for a few hours each afternoon while she was absent. DiMatteo and Mascitti were shown to be "bank" workers who called Scafidi about gambling at least once each day. A court-ordered wiretap of Scafidi's home phone showed that he operated a lottery "accounting office". Because one defendant, Riccardi, was acquitted on this count, the Government failed to show the involvement of five people in the operation, as necessary under §1955. The count was thus dismissed.

Three court orders had authorized the bugs at Apartment 309: Orders 309-I, 309-II, and 309-III. 309-I was issued by Judge Orrin G. Judd on December 8, 1972, and authorized interceptions for 15 days. 309-II was issued by Judge Jack B. Weinstein on January 15, 1973, permitting interceptions for 15 days. 309-III was issued by Judge George Rosling on February 20, 1973, approving interceptions for 15 days at Apartment 309 and at Scafidi's residence in Queens. All the orders listed some of the defendants by name and included "others as yet unknown" as targets. The bugs at Apartment 309 were installed on the night of December 8, 1972, after the building superintendent gave the agents a key to gain entry. The agents re-entered the apartment once more during the surveillance to reposition one bug.

Because the Apartment 309 Count was ultimately dismissed, any investigatory errors of the police are relevant on appeal only to the extent that the evidence presented for this Count might have "spilled over" to affect other counts.

The Hiway Lounge Count: The Napolis, DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo.

This was the principal count. Court-ordered bugs revealed that the Lounge was the headquarters for a massive numbers game. James Napoli, Sr. was the leader, with Napoli, Jr., Carrara, and Vigorito working as "controllers". DeLuca worked as an "accountant", and Mascitti and Di Matteo were "bankers".

The bugs at the Lounge had been installed pursuant to three court orders: Orders Hiway-I, Hiway-II and Hiway-III. Hiway-I was issued by Judge John R. Bartels on April 12, 1973, authorizing interceptions for 15 days excluding Sundays. The named targets were the Napolis,

DiMatteo, DeLuca, Martin Cassella and Richard Bascetta. Hiway-II was issued by Judge Bartels on May 3, 1973, *i.e.*, three days after the end of Hiway-I, authorizing the bugs for 15 more days, excluding Sundays. The targets named were the Napolis, DeLuca, Voulo, several non-appellants, and "others as yet unknown". Hiway-III was issued on May 24, 1973, *i.e.*, three days after the end of Hiway-II. The tapes obtained by Hiway-III were not sealed until more than three months later. No evidence from Hiway-III was introduced at trial.

The listening devices used in the Lounge were placed by FBI agents on the night of April 12-13, 1973. They were originally placed with one at the bar and one in a back room. During the pendency of Hiway-I the agents re-entered the Lounge to move the bar bug into the back room. During the three-day "pause" between Hiway-I and Hiway-II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the bugs. At some point during Hiway-II and Hiway-III the agents re-entered to restore the batteries once again.

II.

The appellants raise many points of alleged error and each adopts the points argued by the others.

Besides the question of standing, namely, the right to question the legality of the surreptitious entries by agents to place the electronic devices which recorded the appellants' conversations, appellants' arguments focus primarily on various claims that the warrants pursuant to which the agents acted were for numerous reasons illegal and violative of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*

At the close of the Government's case, the conspiracy count was dismissed as to all appellants because of the dis-

crepancy between the single conspiracy alleged in the indictment and the evidence of multiple conspiracies shown at trial. The Court's dismissal of the conspiracy count gives rise to appellant's claim that reversible error resulted from the Court's refusal to grant a mistrial or to sever the trial as to the individual defendants. Their claim is that the spill-over effect of the evidence admitted pursuant to the conspiracy count was highly prejudicial and probably responsible for the respective convictions.

Whether appellants have standing to object to the surreptitious entries of Apartment 309 and the Hiway Lounge.

Appellants argue that the evidence derived from the bugs planted in Apartment 309 and the Hiway Lounge should be suppressed because of allegedly improper surreptitious entries made by the agents to place and recharge the bugging devices. The Government contends that none of the appellants has standing to question the entries into Apartment 309, and that only Napoli, Sr. has standing to object to the entries into the Lounge.

All of the appellants were in some way overheard on the bugs planted in Apartment 309 and/or the Lounge. Thus, they all claim that they have standing to object to any unauthorized entries because they are "aggrieved persons" within the meaning of 18 U.S.C. §2510(11). But that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. *See Alderman* v. *United States*, 394 U.S. 165 (1969) (proprietor can object to any unauthorized wiretap; those over-

heard can object only to their voice being overheard); and *Brown* v. *United States,* 411 U.S. 223 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because the true lessee, his friend, lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry.

Whether a court order authorizing illegal entry for secret placement, repair and/or removal of bugs is required as a part of, or in addition to, the court order authorizing the use of bugs.

Mascitti and his co-appellants claim that Title III of the Omnibus Crime Control Bill of 1968, 18 U.S.C. §2510 *et seq.*, prohibits all surreptitious police entries to install,

repair or remove court-authorized bugs. However, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. *See United States* v. *Ford,* 414 F.Supp. 879, 883 (D. D.C. 1976), *aff'd* 553 F.2d 146 (D.C. Cir. 1977); S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968).

There remains the question of whether the authority granted by Title III is properly implemented where the court which approves the use of bugs does not explicitly authorize, either in the authorization order or in a separate order, secret break-ins to place, repair and/or remove the bugs. The Government argues that permission to make secret entries is at least implied in the bug authorizations here. Appellants argue, however, that all evidence gathered must be suppressed unless the court specifically authorizes secret entries.

The courts appear to be split on this issue, particularly after the recent District of Columbia Court of Appeals decision wherein it was held that the legislative purpose of Title III requires a separate court order for entry, *United States* v. *Ford,* 553 F.2d 146 (D.C. Cir. 1977). *See United States* v. *Altese,* No. 75 Cr. 341 (E.D.N.Y., Oct. 14, 1976) (separate order *not* required); *United States* v. *Dalia,* 426 F.Supp. 862, 865-66 (D.N.J. 1977) (separate order *not* required); *United States* v. *Finazzo,* 429 F.Supp. 803, 806-8 (E.D.Mich. 1977) (separate order required). It must be noted that until the District of Columbia Circuit spoke on this issue, it was generally considered proper practice *not* to require a separate warrant for entry.

The orders in our case, after a recital of facts charging that various appellants "have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning in whole or in part

a gambling business" in violation of State and Federal law, authorized the agents to intercept oral communications of the appellants specified therein at the named premises. The orders further provided that

> "this authorization to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception. . . ." App. at A238, A276.

There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

As Chief Judge Mishler stated below in his Memorandum Decision dated October 14, 1976,

> "[I]t is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment." App. at A133.

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning. Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss the best (or least objectionable) method of entry and the areas for the installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its supervisory requirements, makes no mention of any need for a separate entry order. That the statute requires general supervision by the courts over

the bugging operation does not even impliedly impose on them the practical enforcement steps.

We, therefore, hold that when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required.

Nor do the subsequent entries for repair or battery recharging alter this result. These were not entries for any purpose other than that originally authorized. No greater incursion into the appellants' privacy occurred from the re-entries than resulted from the original entries. Furthermore, there is no suggestion that in any of the entries the FBI agents seized or attempted to seize or inspect papers or other articles not embraced in the order. They adhered to the authorized single purpose of seizing conversations represented in the papers on which the orders were granted as being of a criminal nature.

Whether the Government violated various provisions of Title III.

Mascitti contends that the affidavits underlying Order 309-I did not sufficiently demonstrate the need to bug the particular apartment. This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

Napoli, Sr. presents a similar insufficiency contention regarding the affidavit for interceptions at the Hiway Lounge. But the affidavit presented information gleaned from the bug of Apartment 309 as well as information gotten from confidential informants with established records of credibility. Also, physical surveillance identified the comings and goings of the principal suspects. The 25-

page affidavit of Special Agent Parsons reveals more than sufficient information to justify the issuance of the Hiway-I warrant. App. at A277-A302.

DiMatteo argues that the affidavit underlying the bugs at Apartment 309 did not sufficiently demonstrate what other investigative procedures had been tried without success. *See* 18 U.S.C. §2518(1)(c). But the affidavit adequately informs the judge of the "nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods", which is precisely what it has to do to satisfy the statute. *United States* v. *Hinton*, 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 493, 796 (1977); *United States* v. *Fury*, 554 F.2d 522, 530 (2d Cir. 1977).

Mascitti, DiMatteo and Vigorito argue that the "delays" in sealing the tapes of conversations after the expiration of their authorizing orders require suppression of the tapes.

In *United States* v. *Fury, supra*, 554 F.2d at 532-33, we held that, where a single order was extended, the tapes did not have to be sealed until the end of the last extension. Where the intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires sealing only at the conclusion of the whole surveillance. *United States* v. *Principie*, 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 1173 (1977). The foregoing applies to the short delays in sealing 309-I and 309-II as well as Hiway-I and Hiway-II, for once the later Orders are deemed extensions of the prior ones, the administrative delay in sealing—in only one instance more than seven days—is reasonable and fully understandable. Even if the later Orders are deemed separate events, the sealing delays are quite distinguishable from those in the case relied upon by the appellants, *United*

States v. *Gigante,* 538 F.2d 502 (2d Cir. 1976), where the unexcused delay was for over eight months.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to Order 309-III. These tapes were sealed after a delay of seven days caused primarily by the preoccupation of Special Attorney Barlow with preparations for the upcoming trial. Testimony presented to the trial judge made clear that the delay was not the result of any intent to evade statutory sealing requirements or to gain any tactical advantage. We agree with the trial judge that the Government has presented a satisfactory explanation for this short delay, fully in accord with the requirements of 18 U.S.C. §2518(8)(a). *United States* v. *Fury, supra,* 554 F.2d at 533.

Vigorito argues that the Government continued the Hiway-I and -II bugs beyond their 15-day expiration dates. But the authorizations for the bugs expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods.

Mascitti contends that the Government's failure to timely file "progress reports" to the authorizing judges requires suppression of the tapes gotten from the bugs. In several instances involving the 309 Orders, progress reports were filed up to two weeks late or not at all; with the Hiway Orders, one report was filed two days late. While these reports should have been timely filed, the sanction for failure to do so is surely not automatic suppression of the tapes. The requirement of reports, designed to enable the district judge to evaluate the continuing need for surveillance, is in the first instance discretionary with the judge authorizing the bugs. *See United States* v. *Iannelli,* 477 F.2d 999, 1002 (3rd Cir. 1973), *aff'd* 420 U.S. 770 (1975). So, surely, are any sanctions for failure to file timely. *See*

18 U.S.C. §2518(6). The judges here clearly did not abuse their discretion.

Carrara argues that the Government's failure to name him in the Hiway-II order requires suppression of his conversations gathered by that order. This argument is entirely refuted by *United States* v. *Donovan,* 429 U.S. 413 (1977). Napoli, Sr.'s similar claim is also refuted by *Donovan.*

DiMatteo argues that the misidentification of him as "Pasquale Rossetti" in Order 309-I requires suppression. This argument is frivolous in light of the complete absence of evidence that the Government was not acting in good faith. And the argument of DiMatteo based on failure to serve a timely inventory notice is foreclosed by *United States* v. *Donovan, supra. See also United States* v. *Variano,* 550 F.2d 1330, 1335-36 (2d Cir. 1977).

Whether there was sufficient evidence to convict Scafidi and Carrara.

Only Scafidi and Carrara question the sufficiency of the evidence against them.

Scafidi was observed regularly using 967 East Second Street. In fact, he arrived at the apartment once while the police were searching it. Prior to and subsequent to the use of the apartment, Scafidi had been involved with policy rings which used the same type of wagering records and the same runner identifications. Also, Scafidi's phone calls from his home, properly intercepted by wiretaps, convincingly proved his involvement with the venture.

Carrara was taped while in several incriminating conversations with Napoli, Sr. which strongly support the inference that Carrara was actively involved in the ring as one of its "controllers". The jury properly convicted him on this basis.

Whether Count Four of the indictment (the Hiway Lounge Count) was legally sufficient.

Napoli, Sr. contends that the Hiway Lounge count of the indictment was fatally defective for not specifying the type of gambling business he was alleged to have conducted. This argument holds no merit. The indictment tracked §1955 while specifying approximate dates and relevant New York statutes. This is sufficient under *United States* v. *Salazar,* 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied,* 415 U.S. 985 (1974).

Whether appellants were prejudiced by "spill over" from their joint trial.

Most of the appellants (Napoli, Jr., Mascitti, Vigorito, Voulo, DeLuca, and Carrara) argue that once the trial court dismissed the conspiracy count at the end of the Government's case, the remaining substantive counts should have been severed for separate trials. The settled rule is that such a severance is not required unless prejudice would otherwise result or unless the conspiracy count had not been alleged in good faith. *United States* v. *Ong,* 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977). There is no evidence here of bad faith on the part of the Government, and the conspiracy count was not frivolous; it was dismissed only for variance. The trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants. Moreover, the defendants convicted were found guilty on strong evidence, greatly reducing any risk of prejudice from joinder.

We have carefully considered all of the numerous issues raised by the appellants and find them to be without merit. The convictions are affirmed.

GURFEIN, *Circuit Judge,* concurring:

The dissenting opinion of my respected brother, J. Joseph Smith, and the split in the circuits, *see United States* v. *Ford,* 553 F.2d 146 (D.C. Cir. 1977), and *compare United States* v. *Agrusa,* 541 F.2d 690 (8th Cir. 1976), impels me to add some of my own reasons for concurring in the majority opinion. Congress has constructed a statutory scheme for meeting the problems raised in *Berger* v. *New York,* 388 U.S. 41 (1967), and *Katz* v. *United States,* 389 U.S. 347 (1967), by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The issue is narrow. When a federal agent obtains access by trespass to premises in which he has been ordered to install a device to intercept oral communications by a court order which faithfully follows Title III and which includes a finding of probable cause, has he nevertheless intercepted conversations in a lawless manner as if he had no court order at all? Was there in fact "a neutral predetermination of the *scope* of [the] search"? *Katz* v. *United States,* 389 U.S. at 358. Or are entries to plant "bugs" themselves unconstitutional invasions of privacy *distinct from* the actual eavesdrop sanctioned in the order? An affirmative answer was "[e]ssential to [the] holding" in *United States* v. *Ford, supra,* 553 F.2d at 170, on *constitutional* grounds. I respectfully disagree.

Title III covers oral interceptions ("bugging") without prescribing any duties for the judicial branch on the method to be used in installing the "bug". These statutory requirements were carefully tailored to meet the constitutional requirements set out in *Berger* and *Katz. See United States* v. *Tortorello,* 480 F.2d 764, 771-75 (2d Cir. 1973). Congress knew that whether a "bug" was put in place by trespass or otherwise, the use of a "bug" to intercept conversations would require a warrant except when the "bug" is carried

by a participant in a face-to-face conversation, *On Lee* v. *United States,* 343 U.S. 747 (1952), or is used with the consent of a party. *See Katz, supra.* The warrant under Title III is limited to interception of oral conversations, 18 U.S.C. § 2518, and does not in any way permit the search and seizure of goods or papers on the premises. Indeed, if such goods or papers were subjected to search under the interception order, suppression would follow. There is an analogy to the opening of foreign mail by the Customs, which is not constitutionally offensive provided the letters themselves are not read. *See United States* v. *Ramsey,* —— U.S. ——, 45 U.S.L.W. 4577 (June 6, 1977).

What the statute requires is not a specification by the judge of the method for placing the "bug" but simply "a particular description of the place where the communication is to be intercepted". Congress knew that an order such as is under review, that "electronic *surveillance* of the oral communications of the above-named subjects *shall occur* at the above described premises" (emphasis added), would require covert installation. If supporting proof were needed, it is supplied by the 1970 Amendment, Pub. L. No. 91-358, Title II, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), under which the order authorizing interception of an oral communication may direct a landlord or custodian, among others, to furnish the applicant with all facilities and technical assistance necessary to "accomplish the interception *unobtrusively*" (emphasis added). This provision is not for the protection of the subject of the interception order since it is to be incorporated only "upon request of the applicant". In sum, if the enforcement agent thinks that he can achieve such cooperation on his own, he need not get a court order to execute his mission "unobtrusively" with the cooperation of the landlord or custodian.

With its attention having been called to the need for doing the job "unobtrusively" to the point of enlisting the aid of persons whose aid would amount to trespass, Congress failed to include in Title III a provision such as is found in the New York Criminal Procedure Law § 700.30 (8) which requires that an eavesdropping warrant contain "[a]n express authorization to make secret entry upon a private place or premises to install an eavesdropping device if such entry is necessary to execute the warrant",— a provision added to the otherwise almost verbatim copying of 18 U.S.C. § 2518(4). The judge to whom an application is made may, of course, require more than the statute prescribes before he is willing to sign the order, but the requirement that he separately sanction each surreptitious entry is nowhere to be found in the statutory scheme. That can hardly be due to to congressional oversight. It is implicit that ordinarily only a single entry need be made, save in the exigent circumstance of equipment malfunction, as was the case here. Because the statute does not require the judge to authorize the manner of entry, a contention that the judge is nevertheless required to do so must rest on a reading of the Fourth Amendment itself.

The Fourth Amendment in part reads: ". . . no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The orders here do conform precisely to the requirements of the Fourth Amendment as well as those of § 2518. They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authoriza-

tion is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met. I respectfully suggest that cases which have held trespass to be invalid in the absence of *any* warrant whatever are hardly dispositive. ***But cf.*** the discussion in ***United States*** v. ***Ford, supra.*** In ***Berger*** there was a surreptitious entry but the Supreme Court failed to note it as a ***separate*** constitutional problem. *See* 388 U.S. at 45, 53-64, 81-82, 96-97, 107-12. We do have here "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *See* ***Osborn*** v. ***United States,*** 385 U.S. 323, 330 (1966).

Judge Smith notes that there may be a danger in surreptitious entry. That may be conceded, but the federal judge is hardly in as good a position to evaluate such risks as is the law enforcement agent. Common sense will suggest that, in the absence of a plausible ruse, the "bug" should be put in place when the premises are vacant. A mistake as to whether they are occupied, in fact, could hardly be corrected by a judicial order.

Now that attention has been called to this question in several circuits, it is hoped that Congress will provide the national consensus needed to reconcile the needs of law enforcement with the rights of privacy that belong to all persons until probable cause has been shown and the approval of an independent judge obtained. The finding of what the judge must do in these circumstances to keep the "search" reasonable is, I think, within the prerogatives of Congress. In the meantime, until the Supreme Court

speaks, it might be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order, not so much on constitutional grounds, *see* ***United States*** v. ***Agrusa,*** 541 F.2d 690, 696-98 (8th Cir. 1976),[1] as for the protection of the agents.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent. I would reverse for retrial as to all defendants, with all evidence obtained by electronic surveillance after warrantless surreptitious entries suppressed. The course followed by the agents here makes a mockery of the promise that the "dirty business" of electronic eavesdropping authorized by the Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), would be strictly supervised and controlled. Title III of the 1968 Crime Control Act was drafted with the *Berger* and *Katz* decisions as a guide, including the *Katz* requirement to "conduct the search within precise limits established by a specific court order. . . ." 1968 U.S. Code Cong. & Ad. News 2162, 2163. It is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed

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1 The Eighth Circuit said: "[W]hile there are two aspects to the search and seizure which occurred here [interception of oral communications after forcible entry] as compared with one in *Osborn* and *Katz*, this difference is, for constitutional purposes, one of degree rather than kind." 541 F.2d at 698. In *Agrusa*, though the order permitted "forcible entry at any time of day or night", it was challenged unsuccessfully on Fourth Amendment grounds.

to be unoccupied. The Congress recognized the existence of such devices as the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette pack. 1968 U.S. Code Cong. & Ad. News 2183. Electronic devices in some instances might be installed in a manner not requiring entry by the officers into the premises. See *United States* v. *Ford,* 553 F.2d 146, 151 n. 20 (D.C. Cir. 1977); cf. the "spike mike" of *Silverman* v. *United States,* 365 U.S. 505 (1961). Because of its dangers, "bugging" as distinguished from wiretapping, is relatively little used. See *United States* v. *Ford, supra,* 553 F.2d at 149, n. 12. The choice of methods should be made known to and passed on by the magistrate.

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in *Ford* and draw the line here.

APPENDIX B

ORDERS DENYING PETITION FOR REHEARING *EN BANC* DATED DECEMBER 15, 1977

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of December, one thousand nine hundred and seventy-seven.

Present:

HONORABLE MURRAY I. GURFEIN

HONORABLE LEONARD P. MOORE

HONORABLE J. JOSEPH SMITH

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE SCAFIDI, a/k/a Bo and Luigi, BARIO MASCITTI, a/k/a Bari, ANTHONY DI MATTEO, a/k/a Apples, SAVERIO CARRARA, a/k/a Sammy Smash and Sammy, MICHAEL DeLUCA, a/k/a Mikey Junior, JAMES NAPOLI, JR. a/k/a Junior and Lefty, JAMES V. NAPOLI, SR. a/k/a Jimmy Nap, ROBERT VOULO, a/k/a the Kid, SABATO VIGORITO, a/k/a Sal,

Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants (J. Napoli, Sr., J. Napoli, Jr., S. Vigorito, E. Scafidi, M. DeLuca and R. Voulo)

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of December, one thousand nine hundred and seventy-seven.

UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE SCAFIDI, a/k/a Bo and Luigi, BARIO MASCITTI, a/k/a Bari, ANTHONY DI MATTEO, a/k/a Apples, SAVERIO CARRARA, a/k/a Sammy Smash and Sammy, MICHAEL DeLUCA, a/k/a Mikey Junior, JAMES NAPOLI, JR., a/k/a Junior and Lefty, JAMES V. NAPOLI, SR., a/k/a Jimmy Nap, ROBERT VOULO, a/k/a the Kid, SABATO VIGORITO, a/k/a Sal,

Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the apppellants (James Napoli, Jr., James Napoli, Sr., Sabato Vigorito, Eugene Scafidi, Michael DeLuca and Robert Voulo), a poll of judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judges Mansfield and Oakes dissent in the denial.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

APPENDIX C

PORTION OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DEALING WITH SURREPTITIOUS ENTRIES DATED OCTOBER 14, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

FRANK ALTESE, et al.,

Defendants.

Portion of Decision of the United States District Court

75-CR-341

MISHLER, CH. J.

* * *

Surreptitious Entry Into Apartment 309 and the HiWay Lounge

On December 8, 1972, upon issuance of the 309 I order, agents of the Federal Bureau of Investigation surreptitiously entered the subject apartment with a passkey when defendants were absent and installed the authorized bugging devices. Although the order did not expressly provide for covert entry, the authorizing court well knew that bugging devices were to be employed rather than wiretaps. Similarly, the April 12, 1973 HiWay I order made no express mention as to the means to be employed by government agents in planting the intercept devices. But the court was not without knowledge that surreptitious entry was planned. Special Attorney Barlow testified that upon submitting the surveillance application to Judge Bartels, the Judge inquired as to how undetected installation was to be accomplished. Barlow told him of their plans to enter that night when no one was present and emplace listening devices in the premises' rear area. The defendants contend the facial defectiveness of the orders in that they fail to specifically authorize surreptitious entry to install surveillance devices mandates suppression.

Is express authorization to enter premises in order to emplace electronic bugging devices so as to effectuate the purpose of an intercept order necessary, or is such authorization implicit in the grant of the intercept order? Before turning to this inquiry, a determination must be made as to whether the defendants have standing to assert this challenge.

Portion of Decision of the United States District Court

Riddled with inconsistencies and pervaded by nuances, the question of standing to challenge Fourth Amendment violations has often been considered by federal courts. Yet a synthesis of the leading case on the issue, *Brown v. United States,* 411 U.S. 223, 229, 93 S.Ct. 1565, 1569 (1973), seems to indicate that standing devolves on a defendant only where he was present on the premises at the time the warrant was executed or where he has a proprietary or possessory interest in the quarters searched.

Apartment 309, to which the first series of orders pertained, was leased to a Phyllis Engert, a doctor's receptionist who spent her working day hours away from home. While away, the named subjects, DiMatteo, Mascetti, Mustaccio, Scafidi, and "other yet unknown" carried on their "banking" operations. That they supplied her with illicit payments only gave them a license to use the premises during the daytime; it did not give them a proprietary interest to challenge nighttime entry. Defendants' alternative contention is likewise without merit. They argue that the continuous nature of electronic surveillance resulting in the seizure of conversations when they were on the premises confers standing to challenge the installation of monitoring devices when they were absent. Two distinct aspects circumscribe any search and seizure question; the means used to gain access to the confines to be searched, and the subsequent seizure itself. *United States v. Agrusa,* Slip op. at 11 (8th Cir. July 6, 1973). Defendants' claim, however, only involves the first aspect. Since only Engert's rights were arguably invaded by the initial entry, the defendants cannot be heard to challenge its propriety. Hence the court finds defendants Moscitti, Mustaccio, DeMatteo and Scafidi are without standing to challenge the propriety of the FBI's entry to install devices at Apartment 309.

A different situation lies with respect to defendant Napoli, Sr. and his right to challenge the forced entry into the HiWay Lounge. At the suppression hearing had herein, Napoli, Sr.'s

sister, Mrs. Pascocello, testified as to the corporate structure behind the lounge's operations. After her husband's death she requested that Napoli, Sr. undertake the operations of the lounge and parent corporation Ampas Tavern, Inc. Mrs. Pascocello, however, remained corporate head and continued as the sole owner of the HiWay Lounge.

Though Napoli, Sr. used the HiWay Lounge solely for his gambling enterprise, he is not denied standing. His use of the premises for illegal purposes was with the knowledge and consent of the landlord, Mrs. Pascocello. Napoli, Sr. was the sole tenant in possession of the premises. The court finds therefore, that he has standing to challenge the admissibility of the tapes based on the government's surreptitious entry into the HiWay Lounge on the two occasions, *i.e.* prior to the interceptions pursuant to the April 12, 1973 HiWay I order and pursuant to Judge Judd's May 2nd, 1973 order. (See text, *infra* at 54-55).[12]

Title III is silent on whether agents may rightfully enter premises surreptitiously to install court ordered listening devices without express authorization. The legislative history is scant on the issue of congressional awareness of the possible necessity to employ covert tactics in implementing electronic surveillance. At best there exist only oblique references depicting an understanding of the problems surrounding installation and the shortcomings inherent in subsequent use when noise interference permeates the environment in which the bug is placed. *See* 114 Cong. Rec. 11958, 12989 (1968). This limited congressional direction is further compounded by a paucity of decisional law that deals only indirectly with the issue.[13]

In examining the safeguards that must be afforded, a significant distinction must be kept in mind. Twin aspects enshrine the process of electronic surveillance: the first is the

means employed in installing the monitoring devices while the second is the actual interception itself. *United States v. Agrusa, supra,* at 11. It is this latter aspect at which the thrust of Title III is directed. Detailed facts must be outlined sufficient to show probable cause in order to guard against the indiscriminate initiation of electronic surveillance. To assure that only pertinent conversations are seized, strict minimization requirements are imposed. Fabrication and alteration are supposedly prevented by the demands for judicial sealing of taped interceptions. In short, Congress devised a scheme whereby the judiciary was vested with supervisory control over law enforcement's investigatory methods. Their intention was to ensure that the free flow of conversations and the sanctity of a person's random thoughts would not be jeopardized by technological developments in surveillance techniques and the consequent potentiality for abuse.

The very breadth of the statutory authority vested in the court coupled with the serious nature of the intrusion involved casts an extraordinarily heavy burden on the authorizing judge in deciding whether or not an intercept order is to issue. Not only must he find that sufficient probable cause exists, but he must be satisfied that electronic surveillance is the only investigatory device that will prove successful. The very detailed nature of the requirements set forth in 18 U.S.C. § 2518 demands that the closest scrutiny be given applications for intercept authorization.

That consideration was given by Judge Bartels when the HiWay I order issued on April 12, 1973. Moreover, this court exhaustively reviewed the government's affidavit submitted in support of that order and confirmed that sufficient facts were recited to establish probable cause and to show a particularized need for electronic surveillance. As was pointed out earlier in this opinion, it was obvious that listening devices installed in the

rear area of the lounge were the only means left to the government by which to gather prosecutable evidence against the executives of the enterprise.

Moreover, Judge Bartels was not without knowledge as to what kind of devices were to be employed and how installation was to be effected. Special Attorney Barlow testified that in response to Judge Bartels' inquiry, he informed him of their plans to enter the lounge at night with a passkey in order to plant the bugging devices. The judge's question indicated his awareness of the inherent necessity to surreptitiously enter the premises to effectuate the court order.

It is the court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment. The circumstance underlying the issuance of an intercept order is analogous to the issuance of a traditional search warrant. Both the intercept order and the search warrant serve to sanction intrusions otherwise constitutionally prohibited. The privacy intrusion legitimized by the warrant is the entry into the private confines of the premises, the search and subsequent seizure of physical objects. The warrant itself serves to delimit the places to be searched and the items to be seized in keeping with the particularity requirements of the Fourth Amendment. *Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S.Ct. 2022, 2038 (1971). The purpose to be served by the intercept order is to validate the intrusion resulting from penetrating the arena of confidentiality surrounding criminal conversation which monitoring enables, the interception of that secret conversation, and the subsequent recording. Entry to install bugging devices is but a mere condition precedent that must necessarily be satisfied if the

purpose behind an intercept order is to be effectuated. Entry to initiate surveillance is not another intrusion. Hence, there need not be express authorization in the intercept order that issues for that prerequisite. Judicial control over agents' activities, which is the underlying intent behind the entire wiretap scheme, is adequately accomplished by the limitations specified in the order, in satisfaction of Fourth Amendment requirements, as to the type of surveillance authorized, the location where surveillance is to be conducted, and the type of conversations that can be intercepted.

To order suppression when a court order issued solely because it does not expressly define the permissible methods of emplacement is to propound mere form over substance. This is not a case where government agents were given unrestrained discretion to choose whatever means they desired to effect installation. Hence the court's pronouncement in *United States v. Ford,* 414 F. Supp. 879 (D.D.C. 1976), is inapplicable to the case herein. (*See* N. 13). Sworn testimony was given by Special Attorney Barlow concerning his conversations with Judge Bartels as to the contemplated method of entry. A record existed of the court's implicit consent to nighttime entry by use of a passkey. Where as here surreptitious entry during late night hours was shown to be the only means by which to effectuate the purpose of the HiWay I intercept order, it would contravene all logic to suppress the evidence gathered. Accordingly, Napoli, Sr.'s motion to suppress on the grounds that installation of monitoring was surreptitiously accomplished is denied.

Judge Judd's May 2nd Order

Upon expiration of the HiWay I order on April 30, 1973, monitoring agents discovered that the batteries supporting the listening devices had failed. The government had advance knowledge that an important meeting was to be conducted on

May 3rd at the lounge. However, authorization from Washington for permission to apply for an extension order was not expected to arrive until May 3rd. The FBI's dilemma was obvious. If the HiWay II order would not issue until May 3rd, there would be no way to enter the premises to fix the lifeless devices before the impending meeting took place. Therefore, on May 2, 1973, Special Attorney Barlow appeared before Judge Judd seeking a warrant permitting nighttime entry into the lounge in order to correct the failure. Pursuant to Barlow's representations and the HiWay I order signed by Judge Bartels, Judge Judd issued an authorization accommodating the government's request.

Defendants argue the order was unlawful. They contend that Barlow's oral representations fell short of satisfying the requirements of 18 U.S.C. § 2518 (5) relating to the necessary contents of an application for an extension order. We disagree, however, with defendant's characterization of Judge Judd's May 2nd authorization as an extension order. It did not permit continued surveillance. The order simply authorized entry, seizure, and reparation of the malfunctioning devices. As such it is more properly characterized as a search warrant and the full set of requirements as detailed in 18 U.S.C. § 2518(3) need not be satisfied. Only probable cause need be found to justify its issuance. More than ample probable cause existed. Hence, the order lawfully issued.[14]

Conclusion

For all the reasons heretofore cited, defendants' motion to suppress is denied in all respects, and it is

SO ORDERED.

s/ Jacob Mishler
U.S.D.J.

FOOTNOTES

* * *

12 The court finds that no other defendant, specifically James Napoli, Jr., had an interest in the premises sufficient to confer standing.

13 This court in its research found two reported decisions that dealt with the issue of surreptitious entry by government agents to install court authorized listening devices: *United States v. Agrusa,* Slip op. (8th Cir., July 6, 1976), and *United States v. Ford,* 414 F. Supp. 879 (D. D.C. 1976).

In *Agrusa,* the government agents investigating the defendant for the theft, possession, and sale of property stolen from interstate commerce, in violation of 18 U.S.C. §§ 659, 2315, and 371, secured a court order authorizing electronic surveillance for a period of 20 days at defendant's place of business. The order specifically authorized the government "to make secret and, if necessary, forcible entry any time of day or night . . . upon the premises . . . in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises." Pursuant to this order, government agents forcibly entered the defendant's body shop after regular business hours and planted a listening device. On appeal, the defendant argued the district court could not validly issue such authorization consistent with the Fourth Amendment and other applicable law.

The Eighth Circuit found both constitutional and

statutory support to reject Agrusa's contention; they held the government's forcible entry proper when executed pursuant to express authorization contained in the intercept order. The court, however, specifically noted that they were not rendering a decision on the propriety of the government's actions when taken without express authorization. *Id.* at 11, n. 13.

A similar question as to the propriety of covert actions by government agents was treated in *United States v. Ford, supra.* Therein, a twenty day intercept order provided:

> (d) Members of the Metropolitan Police Department are hereby authorized to enter and re-enter the [premises] for the purpose of installing, maintaining and removing electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse or strategem.

The bugs were installed by a team of officers posing as members of the bomb squad during a bomb scare ruse used to evacuate the premises. The following day, it was discovered that the eavesdropping devices were not working. Police re-entered the same way and the malfunctioning devices were replaced. Representations were made to the reviewing court that judicial approval had been secured for the second entry. This authorization, however, was never transcribed.

The court recognized the inherent necessity to employ

covert tactics in effectuating the intercept order, and the consequent power of the issuing court to authorize surreptitious activity. *Id.* at 882-83. The court, however found the above noted authorization overbroad in that it vested police with unrestrained discretion as to the means to be employed in installing the court ordered listening devices. The court indicated though, that the facial overbreadth of the provision might have been avoided if court authorization for each entry was recorded. The representations of the government attorney as to his conversations with the authorizing judge, concerning the means to be employed in entering the premises on each occasion, were never presented by affidavit nor sworn to under testimony.

14 We submit, however, that if an extension order had issued prior to the government's re-entry and restoration efforts, express concomitant authorization to re-enter would not have to have been included in the continuation order. If a court is apprised of the need to re-enter to fix failing devices at the same time it is considering the application for the extension order, and the order in fact issues, there is inherent authorization for government agents to reenter and repair spent equipment if entry is shown to be the only way by which reparation can be accomplished. (*See* text, *supra* at 52-54).

APPENDIX D

STATUTORY PROVISION INVOLVED

18 U.S.C. §2518(8)(b):

"(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of

good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years."

Nos. 77-1002, 77-1003, 77-1004, 77-6026, 77-6035 and 77-6165

In the Supreme Court of the United States

OCTOBER TERM, 1977

SABATO VIGORITO, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES V. NAPOLI, SR., and JAMES NAPOLI, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL DELUCA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ANTHONY DIMATTEO, PETITIONER

v.

UNITED STATES OF AMERICA

BARRIO MASCITTI, PETITIONER

v.

UNITED STATES OF AMERICA

EUGENE SCAFIDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 564 F. 2d 633. The opinion of the district court (Pet. App. C) is not reported.

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[1] "Pet. App." refers to the appendix in No. 77-1002.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1977. A petition for rehearing, with a suggestion for rehearing *en banc,* was denied on December 15, 1977 (Pet. App. B). The petition for a writ of certiorari in No. 77-6026 was filed on January 12, 1978, the petition in No. 77-6035 was filed on January 13, 1978, and the petitions in Nos. 77-1002, 77-1003, and 77-1004 were filed on January 14, 1978. In No. 77-6165, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to February 13, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in executing a valid court order authorizing the seizure of oral communications at a specified location, law enforcement officers are required by statute or the Fourth Amendment to obtain additional explicit judicial approval to enter that location for the purpose of installing and thereafter maintaining the electronic listening device.

2. Whether the district court should have suppressed evidence of intercepted oral communications on the ground that the government failed to comply with the sealing requirements of 18 U.S.C. 2518(8)(a).

3. Whether the district court should have suppressed evidence of intercepted oral communications involving petitioner DiMatteo because he was referred to as "Pasquale Joseph Rossetti" in the electronic surveillance application and that name had not been listed in the Attorney General's authorization for the application.

4. Whether the evidence is sufficient to sustain the conviction of petitioner Scafidi.

5. Whether the district court abused its discretion in denying petitioner Scafidi's motion for a severance.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955.[2] The court of appeals affirmed, one judge dissenting (Pet. App. A).

1. As the court of appeals observed (Pet. App. 3a), "[t]he evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count)." Petitioners Voulo and Scafidi were convicted on the 967 East Second Street Count. The evidence on that count showed that petitioner Voulo participated in the operation of a policy "bank," a place where money and bets were collected, winning numbers were determined, and daily profits were calculated (Tr. 4408-4429).[3] Petitioner Scafidi visited 967 East Second Street on a regular basis while "banking" activities were taking place, strongly suggesting that he was a link between the bank and "controllers," those who collected bets in the field (Tr. 529-530, 1161-1165, 1841-1844, 1871, 1975-1982).

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[2]Petitioner Vigorito was sentenced to six months' imprisonment pursuant to the parole eligibility provisions of 18 U.S.C. 4205(b)(2) and 30 months' probation and was fined $20,000. Petitioner James Napoli, Sr., was sentenced to five years' imprisonment and was fined $20,000. Petitioner James Napoli, Jr., was sentenced to three years' imprisonment pursuant to 18 U.S.C. 4205(b)(2) and was fined $20,000. Petitioner DeLuca was sentenced to six months' imprisonment and 30 months' probation and was fined $10,000. Petitioner Carrara was sentenced to four months' imprisonment and 32 months' probation and was fined $5,000. Petitioners Voulo, Mascitti, and Scafidi were each sentenced to two months' imprisonment and 34 months' probation. Imposition of sentence on petitioner DiMatteo was suspended in favor of three years' probation.

[3]"Tr." refers to the trial transcript. "H. Tr." refers to the transcript of the hearings on petitioners' pre-trial motions.

The other petitioners were convicted on the Hiway Lounge Count.[4] Petitioner James V. Napoli, Sr., was the central figure in this gambling operation, directing the activities of the "runners" (who collected bets from customers), the "controllers" (who accepted the bets from pickup men and transferred them to policy "banks"), the policy "bank" workers (who determined the winning numbers and calculated daily profits), and the "accountants" (who collated the records of daily betting activity from the "banks") (Tr. 5286-5316). Petitioner James Napoli, Jr., also participated in the management of the lottery and acted as a "controller" *(ibid.)*. Petitioner DeLuca worked in the accounting office (Gov't Ex. 273A; Tr. 5485-5487, 5502-5517), petitioners Vigorito and Carrara were "controllers" (Gov't Ex. 275A; Tr. 3936-3944, 5302), and petitioners DiMatteo and Mascitti were "bankers" (Gov't Ex. 273A; Tr. 5463-5464, 5479-5517, 5276-5278). Petitioner Carrara also was involved in making payments to local police for "protection" (Gov't Exs. 100A, 101A, 224A; Tr. 3785-3786, 3988-3990, 4802, 4804-4806, 4825-4835).[5]

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[4]Petitioner Voulo also was charged in the Hiway Lounge Count, but he was acquitted.

[5]Petitioners Voulo, DiMatteo, Mascitti, and Scafidi were found guilty on the Apartment 309 Count, but that count was thereafter dismissed by the district court on the ground that, because co-defendant Rocco Riccardi was acquitted, the jury had not found that five or more persons had been involved in the gambling operation, as required by Section 1955.

Petitioners and their co-defendants were also tried on a conspiracy count, which was dismissed at the close of the government's case on the ground that the evidence showed the existence of at least two conspiracies, instead of the single conspiracy charged.

2. The government's evidence on the Hiway Lounge Count consisted primarily of conversations in the Lounge intercepted pursuant to three court orders. The first order (Joint App. 274-276),[6] issued on April 12, 1973, authorized the interception of oral communications for 15 days, excluding Sundays. The named targets were the Napolis, DeLuca, DiMatteo, and several co-defendants. The second order (Gov't App. 25-27) was issued on May 3, 1973, and authorized continuation of the initial Lounge interception for an additional 15 days, again excluding Sundays. The named targets were the Napolis, DeLuca, Voulo, and several co-defendants. The third order was issued on May 24, 1973; no evidence derived from this interception was introduced at trial.

The eavesdropping orders specifically identified the premises on which the oral interceptions were to occur but contained no explicit authorization for agents to enter the Hiway Lounge either to install or to repair the listening devices. During the night of April 12-13, 1973, F.B.I. agents entered the Lounge with a passkey and installed two listening devices, one at the bar and one in a back room (H. Tr. 89-90). Agents thereafter re-entered the Lounge once while the first order was in effect to move into the back room the device that had initially been placed at the bar (H. Tr. 186).

During the three-day hiatus between the expiration of the first order and the issuance of the second, the government obtained an order (Joint App. 303) authorizing agents to enter the Lounge during the night of May 2-3, 1973, to restore the batteries in the listening devices so

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[6]"Joint App." refers to the joint appendix in the court of appeals. "Supp. App." refers to the supplemental appendix filed in the court of appeals by petitioner DiMatteo. "Gov't App." refers to the government's appendix in the court of appeals.

that interceptions could resume promptly upon issuance of the second order on May 3.[7] During the interceptions conducted pursuant to either the second or third court orders, agents entered the Lounge once more to rejuvenate the batteries in the listening devices (H. Tr. 70-71).[8]

3. Prior to trial, petitioners moved to suppress evidence derived from the Hiway Lounge and the Apartment 309 surveillances on a variety of grounds, including the government's allegedly improper failure to obtain explicit judicial authorizations for the surreptitious entries into the Lounge and the Apartment. In denying the motion, the district court found that petitioner James Napoli, Sr., alone had standing to challenge the Hiway Lounge entries

[7]During the period when no order was in effect the listening devices remained in the Lounge, but no conversations were monitored (H. Tr. 92). The May 2-3 nighttime entry was necessary because the Department of Justice authorization for the second order could not be received in New York until the morning of May 3, and, based upon conversations intercepted pursuant to the first order, agents believed that an important meeting would be held in the Hiway Lounge on the afternoon of May 3. Thus, if the agents were to restore the batteries prior to the meeting, it was necessary for them to do so before the second surveillance order was in effect (Gov't App. 71-72).

[8]No electronic surveillance was conducted in connection with the 967 East Second Street Count, but much of the government's evidence on the Apartment 309 Count, which was eventually dismissed (*see* note 5, *supra*), was gathered by means of interceptions of oral communications authorized by three court orders, none of which explicitly authorized entry into the apartment.

The orders, each of which authorized the interception of oral communications for 15 days, were obtained on December 8, 1972, January 15, 1973, and February 20, 1973. Using a key furnished by the building superintendent, the agents entered Apartment 309 on the evening of December 8, 1972, and placed two listening devices inside the Apartment (H. Tr. 319-326). The agents re-entered the Apartment once to reposition one of the devices, which had not been productive, and once to remove the devices (H. Tr. 332-333).

by virtue of his status as "sole tenant in possession of the premises" (Pet. App. 28a).[9] On the merits, the court held that the Fourth Amendment did not require the government to obtain a separate entry warrant in addition to an electronic eavesdropping warrant, since "once probable cause is shown to support the issuance of a court order authorizing electronic surveillance[,] thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment" (*id.* at 30a). The court also upheld the agents' May 2-3 nighttime entry to replace the batteries, concluding that the entry had been conducted pursuant to a warrant issued on probable cause and that the additional statutory requirements for electronic surveillance were inapplicable because no such surveillance had been authorized or conducted.

The court of appeals affirmed. Judge Moore, writing for the court, found it unnecessary to decide the question of standing, inasmuch as "whether standing is accorded in this appeal to only one or any number of the [petitioners] will not affect our holding that the [surveillance orders] and the agents' activities were entirely proper" (Pet. App. 8a). The court then rejected petitioners' challenge to the constitutionality of the surveillance-related surreptitious entries (*id.* at 10a-11a):

> There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual

[9]With respect to the surveillance of Apartment 309, the court held that petitioners Mascitti and DiMatteo, the only petitioners whose conversations had been overheard at the Apartment, lacked standing to challenge the surveillance-related entries (Pet. App. 27a).

basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

* * * * *

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

Judge Gurfein concurred. He observed that Congress was aware that successful electronic eavesdropping "would require covert installation" but that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, nevertheless required not a "specification by the judge of the method for placing the 'bug' but simply 'a particular description of the place where the communication is to be intercepted' " (Pet.

App. 18a). Judge Gurfein also agreed with the court that "[t]he orders here do conform precisely to the requirements of the Fourth Amendment * * *" (*id.* at 19a-20a; emphasis in original):

> They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authorization is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.
>
> Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met.

Judge Smith dissented. In his view, "a magistrate [must] pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed to be unoccupied" (Pet. App. 21a-22a).

ARGUMENT

1. The court of appeals concluded that a court order authorizing the electronic interception of oral conversations at specifically designated private premises, in accord with the requirements of 18 U.S.C. 2518, impliedly includes judicial approval for the government surreptitiously to enter those premises "as may be necessary to effect the 'seizure' of the conversations" (Pet. App. 10a). This decision is fully consistent with the congressional intent in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as well as with the dictates of the Fourth Amendment. We recognize, however, that two other circuits have announced divergent views on this issue, which involves an interesting and unresolved aspect of search and seizure law, and that the Court accordingly may wish eventually to consider the issue. We believe nonetheless that further review of this case should be denied: none of the petitioners (with the exception of petitioner Napoli, Sr., on the Hiway Lounge Count) has standing to challenge the covert entries onto premises they neither owned nor occupied; there is no true conflict among the courts of appeals on the issue decided below; and the federal government has adopted a policy of seeking express judicial approval prior to undertaking any entry to plant a court-authorized electronic listening device.

a. There is, to begin with, nothing to petitioners' contention that Title III does not empower courts to authorize covert entries, on probable cause, for the purpose of installing electronic surveillance equipment or that the statute requires such authorization to be explicit in the interception order. Title III is specifically directed at the interception of both "oral" and "wire" communications (18 U.S.C. 2518(1)). In enacting this statute, Congress unquestionably was aware that, while the

interception of wire communications is typically accomplished by means of an outside connection with a telephone line (see *Berger* v. *New York*, 388 U.S. 41, 46), electronic eavesdropping has traditionally required the secret placement of a transmitting device (commonly known as a "bug") inside the area where the conversations are expected to occur (*id.* at 47). See S. Rep. No. 1097, 90th Cong., 2d Sess. 67-68, 102-103 (1968); 114 Cong. Rec. 11598, 12989, 14709-14710, 14732-14734 (1968). See also *United States* v. *United States District Court*, 407 U.S. 297, 307; *Silverman* v. *United States*, 365 U.S. 505, 510; *Lopez* v. *United States*, 373 U.S. 427, 467 n. 15 (Brennan, J., dissenting). Indeed, many of the electronic eavesdropping provisions of Title III were drafted in direct response to this Court's decision in *Berger* v. *New York*, *supra*, which involved a secret entry onto business premises for the purpose of planting a "bug" (388 U.S. at 45). See *United States* v. *United States District Court*, *supra*, 407 U.S. at 302. Yet nowhere in these detailed provisions is there any requirement that the entries essential for the installation and maintenance of listening devices be explicitly authorized by court order.

This silence can hardly be attributed to a studied legislative determination to bar the use of such listening devices. As noted above, both the language and the legislative history of Title III plainly indicate that Congress acted with the purpose of providing authorization, subject to significant safeguards, for both wire interceptions and electronic eavesdropping, and the statute expressly requires that the interception application and order contain a "full and complete statement * * * including * * * a particular description of the nature and location of the facilities from which *or the place where* the communication is to be intercepted * * *." 18 U.S.C. 2518(1)(b)(ii); see also 18 U.S.C. 2518(4)(b) (emphasis

added).[10] Thus, the absence of a specific provision in Title III governing entries to install or maintain listening devices reflects the reasonable assumption that the successful interception of oral communications under the statute would necessarily entail a surreptitious entry and that, at least in the absence of any contrary provision in the surveillance order, judicial authorization for such entries would be implicit in any court order approving the use of electronic eavesdropping.[11]

Here, for example, the judges who approved the electronic surveillance at Apartment 309 and the Hiway Lounge obviously anticipated the need for surreptitious entries to plant the listening devices. The orders authorized the interception of "oral communications," which, as indicated above, virtually without exception requires the placement of a "bug" on the premises. Nothing in the applications for the orders suggested that the government had infiltrated petitioners' gambling operations and intended to have informants install the devices. To the contrary, as the court of appeals found (Pet. App. 10a), the information presented in the applications and

[10]See also 18 U.S.C. 2518(4), which authorizes a court to direct private citizens, including a "*landlord,* custodian or other person," to "furnish [law enforcement authorities] all information, facilities, and technical assistance necessary to *accomplish the interception unobtrusively*" (emphasis added).

[11]Although the American Bar Association also has recognized that surreptitious entry must accompany the installation of most bugging devices (ABA Standards for Criminal Justice, *Electronic Surveillance,* General Commentary, pp. 45, 65 n. 175, 91-92; Commentary on Specific Standards, pp. 139-140, 149; Appendix D, p. 209 (Approved Draft, 1971)), it too has not adopted a specific surreptitious entry provision in either the Tentative Draft of 1968 or the Approved Draft of 1971. Compare §§ 5.7-5.8, p. 8 in the Standards of the Tentative Draft with §§ 5.7-5.8, pp. 18-19 of the Proposed Final Draft of Standards.

supporting affidavits can only be read as notifying the issuing judges that the government planned to undertake secret entries into the Lounge. "It would be highly naive," the court observed, "to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation" (*id.* at 11a). See *Application of United States,* 563 F. 2d 637, 643 (C.A. 4). Moreover, despite the district court's awareness of the necessity for covert entries, the surveillance orders contained no provisions prohibiting or limiting that conduct.[12]

b. Nor, in light of this judicial authorization, were the entries to install and maintain the listening devices in this case in violation of the Fourth Amendment.[13] Entries into unoccupied premises to undertake an otherwise permissible search are of course constitutional (see *Payne* v. *United States*, 508 F. 2d 1391, 1393-1394 (C.A. 5), certiorari denied, 423 U.S. 933; *United States* v. *Gervato*,

[12]Both issuing judges received actual notice of the entries. Special Attorney Fred Barlow testified (H. Tr. 498-500; Joint App. 227-229), and the district court found (Joint App. 132-133), that Barlow had orally informed Judge Bartels of the government's intention to enter the Hiway Lounge surreptitiously. If Judge Bartels had not intended to authorize such an entry, he surely would not have issued the order. Judge Judd was told that "[i]nstallation of monitoring equipment for Apartment 309 occurred at 8:05 p.m. on December 3, 1972." That information was relayed to him in an interception progress report filed by Special Attorney Barlow dated December 18, 1972 (Supp. App. 3a-4a). If Judge Judd believed that the agents had abused the authority conferred by his order when they installed monitoring equipment at Apartment 309, he presumably would have revoked the order and commanded that the interceptions cease. He did not take such action, and the interceptions continued at Apartment 309 until the order expired on December 25, 1972.

[13]The entries, it should be noted, did not result in the seizure of any evidence other than the conversations intercepted pursuant to the court-authorized electronic surveillance (Pet. App. 12a).

474 F. 2d 40 (C.A. 3), certiorari denied, 414 U.S. 864), and the entries here were integral components of a concededly valid electronic surveillance, which had been authorized in advance by a neutral magistrate. Each entry took place pursuant to a court order that was issued upon a strong showing of probable cause and that "particularly describ[ed] the place to be searched, and the persons or things to be seized," thereby satisfying the Amendment's central goal of interposing "a magistrate between the citizen and the police." *McDonald* v. *United States*, 335 U.S. 451, 455. See also *Osborn* v. *United States*, 385 U.S. 323, 330.[14] There is no reason why the judge, in approving the search and seizure of petitioners' conversations, was obliged explicitly to authorize an entry into the premises where the conversations were to occur, when such entry was understood by everyone as essential to the execution of the surveillance order.

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[14]In any event, as the district court found (Pet. App. 27a-28a), petitioner James Napoli, Sr., alone has standing to challenge the admission of the conversations intercepted from the Hiway Lounge, and none of the petitioners has standing to challenge the admission of the conversations intercepted from Apartment 309. If the conversations introduced at trial were illegally obtained, the illegality related not to the seizure of the conversations themselves, which was judicially authorized in full conformity with Title III and the Fourth Amendment, but to the surreptitious entries to plant the listening devices. There is no evidence that any of the petitioners was present when the entries at either location occurred, and the district court properly concluded that the evidence was insufficient to show that any of the petitioners, with the exception of petitioner Napoli, Sr., had a possessory or proprietary interest in either the Lounge or the Apartment sufficient to allow them to contest intrusions made in their absence. See *Brown* v. *United States*, 411 U.S. 223, 229. No petitioner, other than petitioner Napoli, Sr., with respect to the Hiway Lounge, had any expectation of privacy in either location

c. As petitioners note, two courts of appeals, faced with issues similar to those presented in this case, have expressed views at variance with the decision of the Second Circuit. In *United States* v. *Ford*, 553 F. 2d 146 (C.A. D.C.), a court order authorizing the interception of oral communications at a shoe store that served as the center of a narcotics distribution operation expressly permitted the government "to *enter and reenter*" the store "for the purpose of installing, maintaining and removing the electronic eavesdropping devices" and to accomplish the entry "*in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem*" (*id.* at 149-150; emphasis in original). Police officers, posing as members of a bomb squad responding to a bomb scare, entered the store and planted three listening devices. The devices did not function properly, however, requiring the police to re-enter the store, again through a bomb scare ruse, to correct the malfunction. The second entry was not explicitly authorized by a fresh court order, although the judge who had issued the eavesdropping warrant was informally advised of the re-entry in advance and voiced no objection to it.

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when he was not present. See *United States* v. *Galante*, 547 F. 2d 733, 739-740 and n. 11 (C.A. 2), certiorari denied, 431 U.S. 969; *United States* v. *Lisk*, 522 F. 2d 228, 230-231 (C.A. 7), certiorari denied, 423 U.S. 1078.

The court of appeals did not reach the standing issue, explaining that "whether standing is accorded in this appeal to only one or any number of the [petitioners] will not affect our holding that the Orders and the agents' activities were entirely proper" (Pet. App. 8a). This Court also need not consider the matter, cf. *Combs* v. *United States*, 408 U.S. 224, 227 n. 4, unless it is otherwise disposed to grant review on this issue. In that event, it should grant only No. 77-1003, filed by petitioner Napoli, Sr., and should deny the other petitions.

The District of Columbia Circuit affirmed an order suppressing the evidence gathered in the course of the ensuing electronic surveillance. The court accepted "the premise that entries to plant 'bugs' are themselves invasions of privacy distinct from the actual eavesdrop, and therefore require separate consideration in the warrant procedure" and concluded that, "given the showing to the District Judge in this case, the failure of the order to limit time, manner, or number of entries over a 40-day period made the authorization far too sweeping" (553 F. 2d at 170; footnotes omitted).

Although the court of appeals suggested that entries to install listening devices must be authorized by a "warrant narrowly tailored to the demonstrated demands of the situation" (553 F. 2d at 170), thus arguably imposing stringent specificity requirements with respect to such entries that go far beyond the demands of the Warrant Clause in regard to other types of searches and seizures, the holding in *Ford* may be viewed as quite limited in light of the fact that the second entry into the shoe store never received formal judicial authorization except to the extent that authorization might be found in the broad entry provision contained in the original surveillance order. Indeed, the court explained its decision as holding "only that the warrant in this case was defective for expressly authorizing any number and manner of entries when there had been no showing of necessity for such broad authorization" (*ibid.*).

While *Ford* can thus be read as covering narrow ground, there can be no doubt that, to the extent that the court of appeals indicated that some form of explicit judicial authorization is required for each entry to place a listening device, including the initial one, the opinion in *Ford* is inconsistent with the decision below. The same may be said for *Application of United States*, 563 F. 2d

637 (C.A. 4). There, the court, in reversing an order denying the government's application for authorization to install listening devices by means of surreptitious entries, rejected the notion that "once the district court found the interception of the conversations to be allowable under Title III, the decision to secretly enter the premises became a subsidiary tactical matter committed solely to the judgment of the executing officers" (*id.* at 642). Rather, the court stated that "[p]ermission to surreptitiously enter private premises cannot * * * be implied from a valid Title III order sanctioning only the interception of oral communications" (*id.* at 644).[15]

Despite this apparent conflict among the circuits, there is no necessity for this Court to grant review, especially at the behest of petitioners who lack standing to challenge the law enforcement agents' conduct. See note 14, *supra*. Only three courts of appeals have thus far been confronted with the issue decided by the Second Circuit, and *Ford* and *Application of United States* each involved distinguishable factual situations. In *Ford*, not only had the initial entry to plant the listening device been expressly authorized by the surveillance order, but also it had not led to the discovery of any evidence. Hence, the

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[15]See also *United States* v. *Agrusa*, 541 F. 2d 690 (C.A. 8), certiorari denied, 429 U.S. 1045, where the government obtained an order authorizing secret entry into the defendant's place of business to install a court-authorized eavesdropping device. The court held (*id.* at 701) that "law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at the time of entry in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III." It reserved comment on "what result obtains if the officers act without express court authorization to break and enter (although with court authorization to intercept)" (*id.* at 696 n. 13).

District of Columbia Circuit had no need to consider the difficult issue resolved by the court below, *i.e.*, whether a warrant authorizing electronic eavesdropping in a particular location implicitly sanctions a surreptitious entry into that area to place the "bug."

Application of United States, on the other hand, arose prior to any interceptions and involved the validity of the district court's insistence that the government establish a "paramount" or "compelling" interest to justify judicial authorization of the surreptitious entry needed to install a listening device before it would issue a Title III eavesdropping order. Since the government had in fact sought a separate entry provision in the surveillance warrant, the Fourth Circuit's discussion of the necessity for such a provision is dictum, albeit perhaps a considered one.[16]

There is an additional reason why the Court need not consider this issue at the present time. Since the decision in *Ford,* the Department of Justice has instructed attorneys supervising the interception of oral communications to seek explicit judicial approval for each surveillance-related entry.[17] Electronic surveillance

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[16]Indeed, the district court's unwillingness to grant an electronic surveillance order unless the government were able to justify a covert entry in that particular case suggests the correctness of the Second Circuit's conclusion that a court's issuance of an eavesdropping warrant without requiring such a showing or imposing any conditions on the method of placing the "bug" implicitly contemplates and sanctions a surreptitious entry.

[17]The following language is presently included in Departmental authorizations of applications for interceptions of oral communications:

> The application should include a request that the order providing for the interception specifically authorize surreptitious entry for the purpose of installing and removing any electronic

authorizations must be approved personally by the Attorney General or his designated Assistant Attorney General, and approval will be withheld from any application not requesting a specific entry authorization, so there is substantial assurance that this policy will be scrupulously followed. In these circumstances, the lawfulness of surreptitious entries without judicial authorization other than as implied in the surveillance order is unlikely to be a recurring issue.[18]

2. Petitioners Vigorito (Pet. 11-16) and DiMatteo (Pet. 33-38) contend that evidence derived from the electronic surveillance at the Hiway Lounge and Apartment 309 should have been suppressed on the ground that the tape recordings of the intercepted conversations were not sealed "[i]mmediately upon the expiration of the period of the order[s], or extensions thereof," as required by 18 U.S.C. 2518(8)(a). This claim is without foundation.

The tape recordings of the conversations intercepted pursuant to the first order authorizing surveillance at the Hiway Lounge were sealed on May 3, 1973, three days after the expiration of the initial order on April 30 and during the period of surveillance authorized by the second Hiway Lounge order. The recordings obtained as a result of the second Hiway Lounge interception order were sealed on May 24, 1973, three days after expiration of that order and during the period of surveillance authorized by the third Hiway Lounge order.[19] The tape

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> interception devices to be utilized in accomplishing the oral interception. Further, an order should be obtained for each additional entry to replace or maintain any oral interception devices.

[18]It is largely for this reason that the government determined not to seek further review in *Ford.*

[19]As previously noted, no evidence derived from conversations intercepted during the period of the third Hiway Lounge order was used at trial.

recordings from the first Apartment 309 surveillance order were sealed on January 16, 1973, 22 days after the period of the order had expired and during the period of surveillance authorized by the second Apartment 309 order. The tape recordings produced pursuant to the second Apartment 309 order were sealed on February 5, 1973, four days after the expiration of that order and during the period of surveillance authorized by the third Apartment 309 order. The last set of tapes was sealed on March 16, 1973, seven days after expiration of the third and final order authorizing surveillance at Apartment 309 (Joint App. 116).

The district court (Joint App. 119-121) and the court of appeals (Pet. App. 13a) correctly found that the second and third Hiway Lounge orders and the second and third Apartment 309 orders were extensions of the original electronic surveillance authorization at each location. As the district court observed (Joint App. 120), "[t]he applications are replete with language evincing an attempt to secure authorization for continued interceptions; reference is made to crimes the subjects 'are continuing to commit' and further conversations they sought to intercept by 'continued surveillance.' More important is the fact that the orders sought were not to include new subjects, and the affidavit recited in detail the conversations seized under each previous order."

Since the second and third Hiway Lounge orders were but extensions of the first, 18 U.S.C. 2518(8)(a) did not require sealing of any of the Hiway Lounge tapes until the period of the third order had expired. That requirement was satisfied. The same conclusion follows with respect to the tape recordings produced pursuant to the first and second Apartment 309 surveillance orders, since those tapes were sealed during the pendency of the third order. Hence, the only sealing hiatus was the seven-day delay in

sealing the tape recordings for the third Apartment 309 order. In view of the absence of any evidence of bad faith on the part of the surveilling agents and the fact that prior to sealing the tapes had been kept in marked boxes in a locked filing cabinet to which only one agent had the key (H. Tr. 100-104, 113-114, 120), the court of appeals rightly concluded (Pet. App. 14a) that this short delay had been satisfactorily explained by the government and was "fully in accord with the" statutory objective of preserving the integrity of the intercepted conversations.[20] Suppression of the evidence derived from the surveillance therefore would not have been warranted.[21]

3. Petitioner DiMatteo contends (Pet. 39-41) that the reference to him as "Pasquale Joseph Rossetti" in the application for the first Apartment 309 surveillance order

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[20]The courts of appeals are in agreement that reasonable delays in sealing, attributable to use of the tape recordings in connection with preparations for trial or with continued investigation, do not require suppression, particularly where there is evidence that the tapes were kept securely. See *United States* v. *Angelini*, 565 F. 2d 469 (C.A. 7), certiorari denied, No. 77-938, March 20, 1978; *United States* v. *Cohen*, 530 F. 2d 43 (C.A. 5), certiorari denied, 429 U.S. 855; *United States* v. *Sklaroff*, 506 F. 2d 837 (C.A. 5), certiorari denied, 423 U.S. 874. See also *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

The court of appeals properly distinguished its own decision in *United States* v. *Gigante*, 538 F. 2d 502 (C.A. 2). There the delays in sealing ranged from eight months to more than a year, the government offered "no explanation whatsoever" for the delays (*id.* at 504) and "haphazard procedures" were followed in handling the tapes (*id.* at 505).

[21]We note, in addition, that this issue is not likely to be of continuing importance. As we informed the Court in our brief in opposition in *Falcone* v. *United States*, Nos. 74-5500 and 74-5619, in February 1975, long after the surveillances involved in this case, the Department of Justice instituted procedures to remind officials responsible for electronic surveillance of their obligation to present tapes promptly for sealing.

rendered that order invalid, since that name had not been included in the Attorney General's authorization for the application (Supp. App. 1a, 2a). But 18 U.S.C. 2516(1), which requires the Attorney General or a designated Assistant Attorney General to approve every application for a Title III surveillance order, contains no naming requirement. Moreover, the Attorney General's authorization in this case did not purport to limit the persons whose communications were sought to be intercepted to the few names mentioned; to the contrary, it expressly referred to the investigation into violations of 18 U.S.C. 1955 by certain named suspects and by "others as yet unknown." Accordingly, the authorization was broad enough to permit the inclusion of the name "Rossetti" (the person who petitioner DiMatteo was believed to be at the time) in the application.

4. Petitioner Scafidi claims (Pet. 15-23) that the evidence is insufficient to support his conviction on the 967 East Second Street Count, but the court of appeals properly found this argument to be insubstantial (Pet. App. 15a). Petitioner Scafidi was observed entering and leaving the 967 East Second Street residence numerous times in April 1972, usually late in the evening when petitioner Voulo and co-conspirators Joseph Mustacchio and "Buddy" Griffin were there (Tr. 529-530, 1161-1164, 1841-1844, 1871, 1975-1982).[22] On May 1, 1972, when F.B.I. agents arrived at the residence to conduct a search,

[22]Petitioner Scafidi's assertion that his visits to the residence were wholly innocent is belied by the evidence of his prior and subsequent involvement in lottery activities. During a June 1971 search of the premises at 405 Elders Lane in Brooklyn, police officers found petitioners Scafidi and Voulo standing by a table holding betting slips, lottery records, and more than $2,000 in cash (Tr. 4410-4413). In January and February 1973, a number of petitioner Scafidi's gambling-related telephone conversations were intercepted on his home telephone (Pet. App. 15a).

they found petitioner Voulo, Mustacchio and Griffin in a basement room operating what appeared to be a policy "bank." While the search was in progress, petitioner Scafidi arrived on the scene (Tr. 534). The frequency and regularity of petitioner Scafidi's visits was strong evidence from which the jury could have concluded that he participated in the lottery business as a link between the policy "bank" and the "controllers" in the field and that he therefore "advanced" gambling activity in violation of New York law. See N.Y. Penal Law § 225.05 (McKinney 1976).

5. Petitioner Scafidi contends (Pet. 25-27) that he should have been tried separately from his co-defendants. The determination whether to grant a severance of defendants properly joined is committed to the sound judgment of the district court, whose decision may be disturbed on appeal only for clear abuse of that discretion. *Schaffer* v. *United States*, 362 U.S. 511. Petitioner Scafidi has failed to make a persuasive showing that the trial judge abused his discretion in denying him a separate trial.

Petitioner was not, as he suggests, a peripheral participant in a few of the illegal activities charged. He was a defendant in three of the four counts,[23] and, as indicated above, his participation in illegal gambling activities was substantial and continuing. Furthermore, the bulk of the government's evidence was clearly connected to one of the three discrete substantive counts,

[23]Although the conspiracy count tying the three substantive counts together was dismissed by the district court because there was insufficient evidence of a single conspiracy (see note 5, *supra*), the court of appeals found that "the conspiracy count was not frivolous" and that "[t]here is no evidence here of bad faith on the part of the Government * * *" (Pet. App. 16a).

and there is no reason to believe that the jurors were unable to separate the evidence in their minds. Indeed, as the court of appeals observed, "[t]he trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants" (Pet. App. 16a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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